

**Liability and Redress Issues**

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Co-Extra  
International Conference  
Paris, 2-5 June 2009

**Starting Point**

- GM farming may cause losses ...
  - ▶ in case of admixture with non-GM products
    - + to conventional or organic farmers
    - + to distributors
  - ▶ if a GM product turns out to have negative health effects
    - + to consumers
    - + to food or feed producers
  - ▶ to biodiversity
  - ▶ ...
- Even mere fear of future harm may lead to a loss itself

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**Starting Point**

- GM farming may cause losses
- Who shall pay the bill?
  - ▶ Traditionally: The loss lies where it falls.
  - ▶ Only if there is good reason to shift the loss onto someone else will the latter have to indemnify the immediate victim
  - ▶ If so, the immediate victim will be satisfied, but what about the payor?

⇒ The potential for harm and the consequences linked to it are crucial determinants of true coexistence.

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**Starting Point**

- 22 European jurisdictions

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**Starting Point**

- 22 European jurisdictions
- 5 non-European jurisdictions
- International law

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**Starting Point**

- Different liability regimes
- Despite common core fundamentally different approaches in detail with effect on outcome:
  - ▶ Compensable loss
  - ▶ Causation
  - ▶ Reason for liability
  - ▶ ...

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**Starting Point**

- ... and all this overlapped with differing regulatory backgrounds:
  - ▶ tolerance levels
  - ▶ isolation distances
  - ▶ licensing
  - ▶ notification
  - ▶ ...

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**Starting Point**

- ... and all this overlapped with differing policy objectives:
  - General GMO attitude affects applicable liability regime

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**Starting Point**

- ... and all this overlapped with potential contractual deviations:
  - Parties may agree on stricter standards than required.

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**Efforts to Overcome Diversity**

- Harmonization on EC level
  - ▶ EC Products Liability Directive 1985
  - ▶ EC Environmental Liability Directive 2004
  - ▶ Harmonization of rules affecting cross-border litigation

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**Efforts to Overcome Diversity**

- Harmonization on EC level
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  - ▶ EC Environmental Liability Directive 2004
  - ▶ Harmonization of rules affecting cross-border litigation
- Harmonization on international level (but only affecting cross-border losses)
  - ▶ CoE Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment
  - ▶ Cartagena Protocol on Biosafety

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**Efforts to Overcome Diversity**

**Cartagena Protocol on Biosafety**

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### Efforts to Overcome Diversity

**Cartagena Protocol on Biosafety**

- ▶ MOP 4 Decision BS-IV/12 on liability and redress
- ▶ Last discussed at a meeting in Mexico City (23-27 February 2009)
- ▶ Yet unclear how it will develop:
  - ◆ optional or binding
  - ◆ administrative vs. civil liability regime
  - ◆ definitions of key elements (e.g. damage)
  - ◆ exemptions
  - ◆ defences
  - ◆ ...

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- **Further harmonization?**

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Further harmonization?

- Degree of harmonization?
- Feasibility of harmonization?
- Desirability of harmonization?
- Where to start?

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### State Involvement

- **Problems with equality**
- **Participation of the state by ...**
  - ▶ creating a regulatory environment which clearly defines the standard of care
  - ▶ supporting the insurance industry by
    - ◆ creating demand by requiring insurance
    - ◆ backing up risks exceeding certain limits
  - ▶ installing compensation funds at least temporarily until the insurance industry can take over
  - ▶ ...

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### Outlook

- Tort law can offer solutions, but do we want them?
- The insurance industry does not yet seem to be prepared to step in.
- In a comparative perspective, existing approaches are diverse and lead to different outcomes depending on the legal system (and its attitude towards GM farming).
- Regulatory framework for coexistence crucial also for ex post analysis if damage is caused.

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### Thank you for your attention!

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